Supreme Court, U.S.
FILED
JUL 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-63

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FLORAMERICA, S.A., CULTIVOS DE CARIBE, LTDA., AND JARDINES DE COLOMBIA, LTDA.,
Petitioners

v.

UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Federal Circuit erred in failing to remand prejudicial judicially-recognized error to an administrative agency for correction in disregard of the doctrine of primary jurisdiction enunciated by this Court and recognized by the several Circuit Courts of Appeals.

2. Whether the Court of Appeals for the Federal Circuit erred in refusing to remand prejudicial judicially-recognized error to an administrative agency for correction on the basis that a single document of record constituted substantial evidence in support of the agency determination, when the record as a whole refuted that determination.

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FLORAMERICA, S.A., CULTIVOS DE CARIBE, LTDA., AND JARDINES DE COLOMBIA, LTDA.,
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v.

UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Floramerica, S.A., Cultivos de Caribe, Ltda., and Jardines de Colombia, Ltda.[1] (hereinafter "petitioners" or "Floramerica") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered on April 11, 1990, affirming a decision and judgment of the United States Court of International Trade

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[1] The three companies are interrelated through common ownership. All three companies, as well as other related companies in Panama, Holland and Florida, are privately held and owned by members of a single family.

granting partial summary judgment in favor of the respondent United States.[2]

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (App. 1a-10a) is reported at 901 F.2d 1089 (Fed. Cir. 1990). The opinions of the U.S. Court of International Trade (App. 11a-53a), from which the petitioners took their original appeal, are reported at 717 F.Supp. 834 (Ct. Int'l Trade 1989) and 704 F.Supp. 1114 (Ct. Int'l Trade 1989). The determination of the International Trade Administration, U.S. Department of Commerce, in the underlying administrative action, is reported at 52 Fed. Reg. 6842. (App. 54a-97a).

JURISDICTION

The opinion of the Federal Circuit was issued on April 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Federal Circuit's jurisdiction was predicated upon 28 U.S.C. § 1295(a)(5), while that of the United States Court of International Trade was based on 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a.

STATUTORY PROVISIONS INVOLVED

1. Section 1677b of Title 19 of the United States Code, 19 U.S.C. § 1677b, which sets forth the authority of the International Trade Administration of the Department of Commerce to make circumstance of sale adjustments in making price comparisons under the antidumping law, 19 U.S.C. §§ 1673-1677k, is reproduced at App. 98a-101a.

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[2] In addition to the United States, the Floral Trade Council of Davis, California and Asociacion Colombiana de Exportadores de Flores ("Asocolflores") participated in the proceedings before the U.S. Court of International Trade and the Court of Appeals for the Federal Circuit.

2. Section 1516a of Title 19 of the United States Code, 19 U.S.C. § 1516a, which sets forth the procedures, authority and standards for judicial review of International Trade Administration action under the Tariff Act of 1930, as amended, is reproduced in pertinent part at App. 102a-103a.

REGULATORY PROVISIONS INVOLVED

1. 19 C.F.R. § 353.15(c) (1989) (superseded text), which provides that in making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market ("the ESP offset"), is reproduced at App. 104a-105a

2. 19 C.F.R. § 353.13 (1989) (superseded text), which provides that the person alleging entitlement to any adjustment pursuant, *inter alia*, to 19 C.F.R. § 353.15, must establish entitlement thereto to the satisfaction of the Secretary, is reproduced at App. 104a.

STATEMENT OF THE CASE

The petitioners are related growers and exporters in Colombia of fresh cut flowers that became the subject of an antidumping duty investigation by the International Trade Administration ("ITA"), U.S. Department of Commerce ("Commerce"), in 1986. That investigation culminated in a finding in March 1987 that the petitioners had sold certain cut flowers in the United States at prices that were lower than were charged for identical merchandise sold to third country markets. This ITA determination resulted in the imposition of additional duties on flowers shipped by the petitioners to the United States.

The ITA's decision was appealed by Floramerica on the basis that certain adjustments to price that are permitted by law and regulations to ensure fair price com-

parisons had not been fully recognized by the agency. The U.S. Court of International Trade granted summary judgment for the respondent United States on this issue. On April 11, 1990, the U.S. Court of Appeals for the Federal Circuit affirmed the decision of the Court of International Trade.

I. BACKGROUND

The U.S. antidumping law, codified at 19 U.S.C. §§ 1673-1677k, provides for the imposition of antidumping duties when imported merchandise, which is causing material injury, is sold in the United States at a price that is less than "fair value". Commerce has been given the responsibility for administering the law and for determining "fair value" within the context of individual product investigations. In this connection, Commerce is directed by the statute to compare the price at which the merchandise is sold in the United States (so-called "United States price") with the price at which such or similar merchandise is sold in the foreign exporter's domestic market ("foreign market value"). 19 U.S.C. §§ 1673a and 1677b. In the absence of sales of the merchandise in the exporter's home market, Commerce is empowered to consider sales to third country markets or constructed value. 19 U.S.C. § 1677b.

In making comparisons between United States price and foreign market value, the law and Commerce's regulations require that certain adjustments be made. 19 U.S.C. § 1677b(a)(4); 19 C.F.R. § 353.15(c) (1989) (superseded text). The purpose of these adjustments, as they relate to cut flowers, is to establish a net farm-gate price in the markets under consideration so that an apples-to-apples comparison can be made. Thus, for example, both the United States price and foreign market value provisions instruct that adjustments to price be made, *inter alia*, for packing costs and all other costs, charges and expenses incident to placing the merchandise in condition packed ready for shipment. 19 U.S.C. §§ 1677a, 1677b.

II. PROCEEDINGS BEFORE THE U.S. COMMERCE DEPARTMENT

In response to a petition from the Floral Trade Council (representing U.S. growers), Commerce initiated an antidumping investigation of fresh cut flowers from Colombia on June 10, 1986. Commerce presented questionnaires to 12 Colombian companies, including the petitioners, to elicit information, such as U.S. prices, third country prices and production costs, necessary to its statutory determinations.

The petitioners submitted voluminous information to the Commerce Department, including price adjustment data, during the investigation. This information was verified by the agency on-site in Panama, Colombia and the United States. The petitioners accordingly requested that specific price adjustments be allowed by the agency in making the required price comparisons. In its determination, Commerce specifically declared that the requested adjustments were appropriate and would be granted (App. 91a). However, when the agency disclosed its specific calculations to the petitioners, it was discovered that the entire amount of the requested adjustments had not been made. This error resulted in a finding that the petitioners were pricing their product in the United States at less than fair value.

As a result of this determination, the U.S. Customs Service was directed to impose antidumping duties on imports of the petitioners' cut flowers.

III. PROCEEDINGS BEFORE THE U.S. COURT OF INTERNATIONAL TRADE

During April 1987, both the Floral Trade Council and Asocolflores (the trade association of the Colombian growers, including the petitioners) filed separate actions challenging different aspects of the Commerce antidumping determination. Count IX of the complaint filed by the petitioners and Asocolflores contained Floramerica's

argument that the ITA had failed to make allowance for the full amount of certain price adjustments that, had they been fully recognized, would have resulted in a finding that the sales to the United States were made in conformity with U.S. law.

The U.S. Court of International Trade in its January 1989 opinion in the consolidated actions found that certain elements of the Commerce determination were not in accordance with law or not adequately explained in the agency's decision. These matters were remanded to the agency for further consideration and, if appropriate, correction.

In connection with the price adjustment issue affecting the petitioners, the Court of International Trade found that the agency erred in failing to allow the full amount of the relevant price adjustment, but refused to remand the issue for further agency review based on a finding that the petitioners contributed to the agency's error by submitting certain data late in the investigation and in an ambiguous manner (App. 42a-47a).

In a separate opinion issued regarding the ITA's decision on remand, the Court of International Trade again addressed petitioners' allegations but again declined to remand the question. (App. 24a-26a). The Court stated that whereas it possessed the equitable power to order a remand to correct an evident error, to do so would be unfair to other parties in the same action who had been denied other relief in companion cases arising out of other antidumping investigations. (App. 26a)

IV. PROCEEDINGS BEFORE THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Floramerica filed a notice of appeal on September 12, 1989, requesting that the judgment of the Court of International Trade, sustaining the decision of the Department of Commerce regarding Floramerica, be reversed. Floramerica predicated its appeal on the Department's

erroneous calculation of foreign market value and the lower court's recognition of, but failure to remand, that error.

The lower court had asserted error categorically. "The next step is where ITA erred." (App. 45a). "ITA could have been more diligent . . ." (App. 46a). "The court realizes it is perpetuating an error . . ." (App. 47a).

On April 11, 1990, the Court of Appeals affirmed the decision of the Court of International Trade. In its opinion, the Court of Appeals noted that the lower court had found that Commerce had "erred in not deducting the indirect selling expenses of Crown [Floramerica's sales agent] from the foreign market value." (App. 3a) Nonetheless, like the Court of International Trade, the Court of Appeals declined to remand the issue to Commerce for correction, instead finding that there was substantial evidence to support the agency finding on the basis that the agency was entitled to rely on a document filed late in the investigation to the exclusion of other evidence of record and without reference to the record as a whole (App. 8a).

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUIT'S OPINION IS IN CONFLICT WITH HOLDINGS OF THIS COURT ON THE QUESTION OF PRIMARY JURISDICTION AS CONSTRUED AND APPLIED BY THE CIRCUIT COURTS OF APPEALS.

The Federal Circuit's opinion disregards the doctrine of primary jurisdiction recognized by this Court early in the development of administrative agencies and, therefore, should be reviewed. *See Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The purpose of the doctrine, well articulated in *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767-768 (1947), required that the Federal Circuit remand this

case to the Commerce Department for further deliberations:

> Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or defining judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination . . .

Far Eastern Conference v. United States, 342 U.S. 570 (1952); *Great N. Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922).

Decisions both by this Court and the Courts of Appeals in the various circuits have recognized that the doctrine of primary jurisdiction not only requires that an administrative agency be permitted in the first instance to consider certain issues, but also that a reviewing court that determines that an agency's factual finding is in error, inadequately explained, or that the agency has otherwise abused its discretion, must remand the question to the agency for further deliberation. *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *Abramowitz v. EPA*, 832 F.2d 1071, 1078 (9th Cir. 1987); *Sears Sav. Bank v. FSLIC*, 775 F.2d 1028, 1030 (9th Cir. 1985). *See also Marx v. Director, OWCP, U.S. Depart. of Labor*, 870 F.2d 114, 122 (3d Cir. 1989); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 919 (5th Cir. 1983).

The Federal Circuit and the U.S. Court of International Trade erred in failing to remand the question of

the petitioner's price adjustment claims to Commerce despite the Federal Circuit's declaration that:

> . . . had the ITA known at the time of its determination all of the facts that were so clearly described by Floramerica before the Court of International Trade, the ITA would have granted a larger indirect selling expense offset than it did. According to the court [Court of International Trade], the ITA erred in not deducting the indirect selling expenses of Crown [an affiliate of the petitioners] from the foreign market value.

(App. 3a).

By declining to require a remand of this question to the agency after acknowledging that the Court of International Trade had found that a prejudicial error had been committed by Commerce, the Federal Circuit usurped the power and prerogative of the agency and improperly substituted its judgment for that of the agency. In doing so, the Federal Circuit departed from the teachings of this Court and of the other Circuit Courts of Appeals. *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416-419 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943); *Flynn v. Schultz*, 748 F.2d 1186, 1194 (7th Cir. 1984), *cert. denied*, 474 U.S. 830 (1985); *Ritter Transp., Inc. v. ICC*, 684 F.2d 86, 88 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983).

It also disregarded the precedent of the Court of International Trade over which it exercises appellate jurisdiction. *See, e.g., The Timken Co. v. United States*, 7 CIT 319, 320 (CIT 1984). In that case, it appeared that the ITA's method of calculating the dumping margins may not have been in accordance with its normal practice and may have been contrary to applicable law and regulation, circumstances which are present in the in-

stant case. The Court concluded that it was appropriate to remand the case to the agency for further consideration. The Court stated:

> The law is clear that remand is appropriate where an agency has followed an improper method in making a determination or where there has been a defect in the agency's finding. *See, e.g., Ford Motor Co. v. NLRB*, 305 U.S. 364, 374-75 (1939); *Greene County Planning Bd. v. Federal Power Comm'n*, 559 F.2d 1227 (2d Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1086 (1978). Indeed, a failure to reopen in the face of erroneous factual information that would clearly mandate a change in result would itself be arbitrary and capricious. *Greene County, supra*, 559 F.2d at 1232. Thus this Court has on several occasions remanded cases to the administrative agency for the purpose of clarifying or correcting challenged determinations. [Citations omitted].

Id. Accordingly, the Court should grant this petition so that a decision contrary to Supreme Court precedent and in conflict with the decisions of each of the referenced Circuit Courts of Appeals that has considered the issue may be reviewed.

II. THE FEDERAL CIRCUIT'S OPINION DEPARTS FROM THE HOLDINGS OF THIS COURT THAT THE EXISTENCE OF SUBSTANTIAL EVIDENCE MUST BE DETERMINED IN LIGHT OF THE WHOLE RECORD.

The Court of International Trade and the Federal Circuit have defined the "substantial evidence" standard consistently with the decisions of this Court.

> The "substantial evidence" standard used by the Court to evaluate whether the agency's findings are supported by law contemplates "essentially a limited review of the agency determination, insuring that the agency conclusions are reasonably drawn from some evidence, more than a mere scintilla, *in light of the record as a whole.*" *Alhambra Foundry, et*

> *al. v. United States*, 626 F.Supp. 402, 407 (1985). (Emphasis added.)
>
> This limited standard of review should not imply, however, that the agency's findings are absolute, for to so hold would render this Court's function meaningless. The Court's overview is necessary to modify, from time to time, "ITA's overly sweeping view of the authority it is granted" to administer the antidumping laws of the United States. *Olympic Adhesives, Inc. v. United States*, No. 89-1367 at 14 (Fed. Cir., March 28, 1990).

American NTN Bearing Mfg. Corp. v. United States, No. 89-06-00338 (Ct. Int'l Trade, May 22, 1990). Notwithstanding its succinct definition of the applicable standard of review and despite noting that it was "perpetuating the error" of the ITA (App. 47a), the Court of International Trade based its decision to refuse remand in the instant case on allegedly ambiguous statements in a single document and not on a review of the evidence in "light of the record as a whole".

The Federal Circuit's opinion similarly endorsed Commerce's reliance on a single document in the record in finding that there was substantial evidence to support the agency's admittedly erroneous determination. In doing so, the Federal Circuit departed from the well established principle that review of an agency decision must be based on the record as a whole. *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 522-523 (1981); *NLRB v. Baptist Hospital*, 442 U.S. 773, 782 (1979); *Mowery v. Heckler*, 771 F.2d 966 (6th Cir. 1985); *Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978).

In its opinion, the Federal Circuit explicitly countenances Commerce's dependence on a February 5, 1987 submission by petitioners during the then ongoing antidumping investigation to the exclusion of all other evidence in the record:

> The ITA could reasonably have assumed that the charts submitted with the narrative showed the total third country indirect selling expense that the appellants were claiming. With this evidence of the claimed offset, the ITA need not have recalculated the foreign indirect selling expense figures *by referring to the previous submissions of the appellants.* (Emphasis added.)

(App. 8a). When the record before the agency contained other data that the Court of International Trade found would have led to a Commerce decision favorable to the petitioners had it been considered by the agency (App. 43a), the Federal Circuit, instead of adopting that finding by repetition (App. 3a), should have sent the issue back to the agency and should not have condoned an administrative decision made in derogation of substantial portions of the record. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *Childcraft Education Corp. v. United States*, 742 F.2d 1413 (Fed. Cir. 1984); *SSIH Equipment, S.A. v. U.S. Intern. Trade Comm'n*, 718 F.2d 365, 382 (Fed. Cir. 1983); *Beavers v. Secretary of HEW*, 577 F.2d 383 (6th Cir. 1978); *Montgomery Ward & Co. v. United States*, 499 F.2d 1283 (C.C.P.A. 1974).

As evidenced by the foregoing, the Federal Circuit's opinion thus "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a). *Universal Camera Corp. v. NLRB*, *supra*, at 491. *See Mobil Oil Corp. v. FPC*, 417 U.S. 283, 292, 310 (1974); *FTC v. Standard Oil Co.*, 355 U.S. 396, 400-401 (1958).

PRAYER FOR RELIEF

WHEREFORE, this Court should grant the petition to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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